Supreme Court, U.S.
FILED
AUG 13 2002
OFFICE OF THE CLERK

No. 01-1873

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

APPELLANTS' BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

ROBERT B. HOFFMAN
REED SMITH LLP
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

PAUL M. SMITH
Counsel of Record
THOMAS J. PERRELLI
BRUCE V. SPIVA
DANIEL MACH
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

August 13, 2002

Counsel for Appellants

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL 1

II. UNDER THE DISTRICT COURT'S MISINTERPRETATION OF *BANDEMER*, NO VALID PARTISAN GERRYMANDERING CLAIM COULD EVER EXIST 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Badham v. Eu, 488 U.S. 1024 (1989) 2

Buckley v. Valeo, 424 U.S. 1 (1976) 7

Carson v. American Brands, Inc., 450 U.S. 79 (1981) 4

Cook v. Gralike, 531 U.S. 510 (2001) 10

Goldstein v. Cox, 396 U.S. 471 (1970) 3

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 7

Holloway v. Hechler, 507 U.S. 956 (1993) 2

Karcher v. Daggett, 462 U.S. 725 (1983) 4

Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 7

MTM, Inc. v. Baxley, 420 U.S. 799 (1975) 2

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 7

Miller v. Johnson, 515 U.S. 900 (1995) 9

Mills v. Alabama, 384 U.S. 214 (1966) 7

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 7

Oldroyd v. Kugler, 461 F.2d 535 (3d Cir. 1972), *remanded to*, 352 F. Supp. 27 (D.N.J. 1972), *aff'd*, 412 U.S. 924 (1973) 2

TABLE OF AUTHORITIES - continued

Page

Pope v. Blue, 506 U.S. 801 (1992) 2

Robertson v. Bartels, 122 S. Ct. 914 (2002) 3, 4

Shaw v. Reno, 509 U.S. 630 (1993) 2, 9

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 10

STATUTES

28 U.S.C. § 1253 . . . . . *passim*

28 U.S.C. § 1291 5

28 U.S.C. § 1292(a)(1) 2

28 U.S.C. § 2101(b) 4, 5

Fed. R. Civ. P. 54(b) 5

MISCELLANEOUS

Daniel H. Lowenstein & Richard L. Hansen, *Election Law Cases and Materials* (2002 Update) 6

11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* (1995) 2, 5

17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* (1988) 3

Appellants Richard Vieth, Norma Jean Vieth, and Susan Furey – plaintiffs in the district court – hereby respond to the motions to dismiss or affirm filed by appellees Robert C. Jubelirer, *et al.* and Governor Mark S. Schweiker, *et al.* – defendants in the district court. Neither set of appellees has responded effectively to the central points made in the Jurisdictional Statement. First, they cannot explain why it is constitutionally justifiable to allow one political party to use its temporary control of a state legislature and governor's office to cement its grip on a super-majority of a State's congressional seats through shameless gerrymandering, even though a majority of votes for Congress regularly go to the opposing party. Second, and relatedly, they have not explained why it makes sense for the courts to pretend that there are meaningful constitutional constraints on partisan gerrymandering while in practice requiring plaintiffs to allege and prove additional facts, unrelated to redistricting, that *never actually exist* (and would be independently unconstitutional if they ever did exist). Instead of addressing these central questions, appellees offer two different but equally unsupported and untenable jurisdictional arguments, apparently hoping to avoid consideration of the merits. Then, discussing the merits, they simply ignore the hard issues.

The Court should note probable jurisdiction.

I. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL.

Under 28 U.S.C. § 1253, the Court has jurisdiction to hear this timely appeal of the district court's final resolution of plaintiffs' claim for injunctive relief from Act 1's partisan gerrymander. The district court's February 22, 2002 order granted defendants' motion to dismiss "Counts II, III, IV, and V of the amended complaint," *see* J.S. App. 32a, thus disposing entirely of plaintiffs' partisan gerrymandering claims. The Jubelirer appellees argue that the February 22 order was not "an order . . . denying . . . an . . . injunction" for purposes of

section 1253. *See* Jubelirer Mot. to Dismiss or Affirm at 7-9. They contend that (1) a grant of dismissal is not a denial of injunctive relief to the plaintiffs and (2) this rule should be applied more strictly because the dismissal left another unrelated claim in the plaintiffs' complaint alive.

These arguments are clearly wrong. They ignore established precedent and would render many merits rulings of three-judge courts completely unreviewable by this Court on appeal. First, there is no doubt that dismissal of a complaint seeking injunctive relief, for failure to state a claim, constitutes an appealable denial of injunctive relief. This Court has exercised jurisdiction under section 1253 to review dismissal orders in a host of cases.[1] Furthermore, that interpretation is fully consistent with the law applied in the courts of appeals under the analogous jurisdictional provision – 28 U.S.C. § 1292(a)(1). *See* 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 2962, at 413-14 (1995) (citing cases). This Court has declined to review dismissals under section 1253 only when the dismissal was not based on the merits of the plaintiff's claim *See MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). But that of course is not the case here.

---

[1]*See, e.g., Shaw v. Reno*, 509 U.S. 630, 637-39 (1993) (exercising jurisdiction over dismissal of racial gerrymandering claim); *Badham v. Eu*, 488 U.S. 1024 (1989) (summarily affirming district court's grant of defendants' motion to dismiss); *Pope v. Blue*, 506 U.S. 801 (1992) (summarily affirming grant of motion to dismiss); *Holloway v. Hechler*, 507 U.S. 956 (1993) (same); *see also Oldroyd v. Kugler*, 461 F.2d 535, 539 (3d Cir. 1972) (declining to exercise jurisdiction despite the lack of an explicit order denying injunctive relief and holding that "dismissal of the suit on the merits is sufficient to effect a judgment appealable to the Supreme Court under 28 U.S.C. § 1253"), *remanded to* 352 F. Supp. 27 (D.N.J. 1972), *summarily aff'd*, 412 U.S. 924 (1973).

Second, the fact that the district court's order left standing plaintiffs' one-person, one-vote claim, while dismissing the partisan gerrymandering claims, makes no difference. The Jubelirer appellees rely on the rule established in *Goldstein v. Cox*, 396 U.S. 471 (1970), that "interlocutory" appeals under section 1253 are limited to appeal from orders granting or denying preliminary injunctions. But *Goldstein* is no bar to an immediate appeal from the dismissal of an injunctive claim, regardless of whether other separate claims remain pending. *Goldstein* involved a truly "interlocutory" situation where the plaintiffs' motion for summary judgment was denied but the same claim remained alive. This case does not.

To the contrary, a dismissal of a claim is treated under section 1253 as a "final" – and thus appealable – denial of a permanent injunction, even if some *other* claim is still pending. "A final determination that a permanent injunction will not issue may be appealed even though other issues remain to be decided." 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4040, at 158-59 & n.56 (1988) (*citing Eichholz v. Pub. Service Comm'n*, 306 U.S. 268, 269 (1939) (exercising jurisdiction over an appeal from a three-judge court's denial of a permanent injunction, despite the district court's decision to retain jurisdiction over defendant's counterclaim and referral of that claim to a master for an accounting)); *see also Robertson v. Bartels*, 122 S. Ct. 914 (2002) (exercising jurisdiction over grant of summary judgment to defendants on two claims even though a third claim remained pending in district court). The Jubelirer appellees have not cited a single case where this Court ruled otherwise. Nor have they explained when, under their theory, the three-judge court's dismissal of the partisan gerrymandering claims ever would have become appealable to

this Court under section 1253.[2] Accordingly, this Court should exercise jurisdiction over the dismissed partisan gerrymandering claims despite the fact that one entirely separate issue remained unresolved at the time of the appeal.[3]

The Schweiker appellees advance a slightly different jurisdictional argument, contending that the order of February 22, 2002 did not constitute a "final order" and thus should have been appealed within 30 days under 28 U.S.C. § 2101(b). *See* Schweiker Mot. to Dismiss or Affirm at 8. The February 22 order that forms the basis of this appeal, however, cannot be considered "interlocutory" for purposes of section 2101(b), and thus the 30-day deadline does not apply.

Here again, appellees cite no case that supports their statutory interpretation. Moreover, in *Robertson v. Bartels*, just last Term, precisely the same argument was raised in identical circumstances, but this Court exercised jurisdiction – affirming the judgment on the merits rather than dismissing the appeal. *See Robertson v. Bartels*, 148 F. Supp. 2d 443, 462 (D.N.J. 2001) (granting defendants summary judgment on two counts and referring a third count to a single judge for disposition), *summarily aff'd*, 122 S. Ct. 914 (2002) (affirming the judgment

---

[2]*Cf. Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981) (regardless of terminology used, order is appealable as a denial of an injunction under 28 U.S.C. § 1292(a)(1) if it has the "practical effect of refusing an injunction" and appellant can show that order can only be effectually challenged through an immediate appeal).

[3]There can be no argument that the injunction against partisan gerrymandering sought by appellants was not yet "denied" because the same injunction might have been obtained using the still-pending one-person, one-vote theory. The latter theory only had the potential to support a quite different and more limited injunction, one merely requiring the State to eliminate or justify population deviations among districts. *See Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

rather than dismissing on grounds of untimely appeal despite appellants' filing notice of appeal 43 days after the judgment); *see also* Motion to Dismiss or Affirm at 14-15, *Robertson v. Bartels*, No. 01-721 (U.S. Dec. 21, 2001).

The proper reading of section 2101(b) is that the 30-day deadline applies to grants or denials of preliminary injunctions and that all other appeals permitted under section 1253 – *i.e.*, appeals from grants or denials of permanent injunctions, whether preceding or coinciding with entry of a final judgment – are appeals from "final" orders and thus subject to the 60-day deadline. That is the rule that this Court has followed and that makes sense of the statutory scheme.

The Schweiker appellees' contrary view is based on a false analogy between the term "final" order in section 2101(b) and the term "final judgment" in Rule 54(b) of the Federal Rules of Civil Procedure. They argue that appellants could have obtained a final and appealable judgment on the partisan gerrymandering claims through a motion under Rule 54(b). But Rule 54 relates only to final judgment appeals under 28 U.S.C. § 1291. An "appellant need not obtain a certification under Rule 54(b) if the order entered by the district court falls under Section 1292(a)(1)." 11A C. Wright, A. Miller & M. Kane, *supra*, § 2962, at 412. The same rule clearly applies under section 1253. There never is any need to invoke Rule 54(b) as a predicate to an appeal from grant or denial of an injunction under section 1253, because the existence of a "judgment" is irrelevant. Accordingly, it makes no sense to interpret the term "final" order in section 2101(b) as referring to a final judgment. Instead, a final order is one that finally grants or denies a permanent injunction.

As appellants sought no preliminary injunction, and the district court's decision permanently disposed of plaintiffs'

gerrymandering claims for injunctive relief, the 60-day deadline applies and the appeal was timely.

II. UNDER THE DISTRICT COURT'S MISINTERPRETATION OF *BANDEMER*, NO VALID PARTISAN GERRYMANDERING CLAIM COULD EVER EXIST.

In requesting summary affirmance of the district court's dismissal of plaintiffs' partisan gerrymander claims, appellees never address the central flaw underlying that decision. The district court's application of *Bandemer* does not, as appellees suggest, merely erect a "strict" or "difficult" standard, *see* Jubelirer Mot. to Dismiss or Affirm at 10-11. Rather, under the district court's conception of partisan gerrymandering, the requirements of such a claim are, as a practical matter, *impossible* to meet. *See, e.g.*, J.S. App. 113a (Zappala, C.J., dissenting) ("If the record of [the state court challenge to Act 1] does not establish unconstitutional political gerrymandering, no such claim exists."); Daniel H. Lowenstein & Richard L. Hasen, *Election Law Cases and Materials* 10 (2d ed. 2002 Update) ("To say the least, it would be the rare case when a major political party could make and substantiate allegations of the sort that the *Vieth* court seems to require.").

It is almost unimaginable that the members of a major American political party could validly make the allegations deemed necessary by the district court – namely, that they "will be completely shut out of the political process." J.S. App. 22a. In so doing, they would be required to support a claim that someone has "prevented, or will . . . prevent [them], from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." J.S. App. 27a (citing *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988)). Even the most pervasively biased partisan gerrymanders will

not, by themselves, create "impediments to . . . full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies." *Id.* (quoting *Badham*, 694 F. Supp. at 670 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). Nor is it conceivable that either party would otherwise attempt to exclude the other altogether from the public forum.

Of course, if one party ever were able to inflict the improbable, extreme harms required by the district court's partisan gerrymandering standard, that conduct would be independently unconstitutional – regardless of the fairness or unfairness of any particular redistricting map. The First and Fourteenth Amendments obviously do not permit one party to "shut out" the other from public debate.[4]

---

[4]*See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (internal quotation marks and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) ("The First Amendment protects political association as well as political expression."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates."); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966) ("[T]he Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").

It is therefore puzzling why any court would draw a linkage between partisan gerrymandering and extreme forms of interference with voting and campaigning. The partisan gerrymandering doctrine is not needed to provide protection for the rights to participate in a campaign and vote. Concomitantly, it is simply illogical to suppose that an extremely biased district map – one that effectively makes the votes of one party's adherents twice as influential as those of the other – is perfectly lawful unless and until grossly unconstitutional burdens on participation are added to the mix.

Notably, appellees never dispute appellants' argument that, under the district court's decision, no plaintiff ever could allege a valid political gerrymandering claim. At bottom, appellees' defense of the district court's decision thus is no different, as a practical matter, from their call for an outright overruling of *Bandemer*. *See* J.S. on Conditional Cross-Appeal No. 02-135 (asking Court to overrule *Bandemer* and hold that partisan gerrymandering claims are non-justiciable political questions); *see also* Schweiker Mot. to Dismiss or Affirm at 12 ("[T]here may well be doubts about the correctness of *Bandemer*'s holding that claims of partisan gerrymandering are justiciable at all."). As explained in response to appellees' conditional cross appeal, however, this Court in *Bandemer* properly recognized an independent, justiciable partisan gerrymandering claim. *See generally* Mot. to Dismiss Conditional Cross-Appeal No. 02-135.

If such a claim retains any vitality, it must have been properly asserted here. As appellants alleged in their Amended Complaint, the challenged congressional map creates one of the most egregious partisan gerrymanders in history, ensuring that one party will gain more than two-thirds of the State's congressional seats even with less than half of the popular vote,

see J.S. App. 125a-126a, drawing meandering, highly irregular districts across the State, *id.* 123a, ignoring all legitimate redistricting criteria, *id.*, and guaranteeing a Republican super-majority for at least a decade, *id.* 127a. That should be enough. Contrary to appellees' assertions and the district court's decision, plaintiffs' Amended Complaint alleged far more than a "mere lack of proportional representation." J.S. App. 23a. It alleged severe bias causing dilution of voting power based on political viewpoint, as well as indirect harms in the areas of "party organizing," "recruitment of viable candidates, fundraising and voter turnout," J.S. App. 128a, and it alleged that these problems will last at least a full decade, J.S. App. 127a.

Furthermore, as discussed in appellants' Jurisdictional Statement, the Court's recent racial gerrymandering decisions shed additional light on political gerrymandering claims. J.S. 23-26. Where, as here, a State draws bizarrely shaped congressional districts that maximize partisan advantage to the exclusion of all legitimate redistricting criteria, the Court's *Shaw* jurisprudence is instructive. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 644 (1993); *Miller v. Johnson*, 515 U.S. 900, 913 (1995). This is not to say, as appellees fear, that the two classes of claims are fully co-extensive; nor do appellants suggest that "'the intentional drawing of district boundaries for partisan ends . . . violates the Equal Protection Clause *in and of itself*.'" Jubelirer Mot. to Dismiss or Affirm at 17-18 (quoting *Bandemer*, 478 U.S. at 138-39) (emphasis added). But *Shaw* points the way to how, under the Equal Protection Clause, courts should differentiate between constitutional and unconstitutional degrees of political bias in maps – by considering whether other districting criteria were sacrificed to a paramount political agenda.

Similarly, although the Court has not yet applied Article I, Section 4 of the U.S. Constitution to political gerrymandering claims, several recent decisions of this Court confirm that States may not use their limited Article I powers to dictate the outcome of congressional elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001). With passage of Act 1, the Pennsylvania General Assembly exceeded its narrow constitutional authority in this area.[5]

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

ROBERT B. HOFFMAN
REED SMITH LLP
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

PAUL M. SMITH
Counsel of Record
THOMAS J. PERRELLI
BRUCE V. SPIVA
DANIEL MACH
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Appellants

August 13, 2002

---

[5]Contrary to appellees' assertions, *see* Jubelirer Mot. to Dismiss or Affirm at 20 n.9, plaintiffs clearly and thoroughly presented their Article I, Section 4 arguments to the district court in their Amended Complaint, *see* J.S. App. 131a, in Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, at 7-12 ("Act I Is Inconsistent with Article I's Limitation of the States' Authority to Regulate Congressional Elections"), and in Plaintiffs' Motion for Clarification and/or Reconsideration.